inconsistent with the relation of father and child. It is sufficient for us to say that in this case the conviction was justified by the evidence".

In my opinion, according to this judgment the length of detention is not a factor to be taken by itself; it is necessary to consider whether the purpose of the taking away was consistent or inconsistent with the relation of father and child; if such purpose is inconsistent with such relationship then the offence is committed no matter how short the time of detention. (See also *R. v. Baillie*[1]). In the present case the behaviour of the appellant at the house in Petaling Jaya, which is clearly the purpose for which he met L there, is undoubtedly inconsistent with the relationship of parent and child.

As regards conviction the appeal must be dismissed.

With regard to sentence, it was submitted that in the circumstances of this case a term of imprisonment for a period of eighteen months is excessive. As pointed out earlier, the fact that a girl being a consenting party cannot absolve the appellant from the charge, but it is a matter to be taken in consideration in dealing with sentence, (see the summing up of Wills J. in *R. v. Mycock*[13]).

I think that in the present case it can fairly be said that L voluntarily and, willingly went to meet the appellant at the agreed place and in such circumstances I consider that a term of imprisonment of four months is an adequate sentence, and I, therefore reduce the sentence from eighteen to four months.

Order accordingly.

MOHAMED KASSIM v. REG.

[A. Cr. J. (Spenser Wilkinson J.) April 11, 1956]

[Penang — Criminal Appeal No. 68 of 1955]

Penal Code s. 304A — Causing death by a rash act not amounting to culpable homicide.

Summary trial — Discretion of prosecution in calling witnesses — Duty of Court at end of prosecution case — Criminal Procedure Code (Cap. 21), s. 182(f).

In this case the appellant was charged with an offence under s. 304A of the Penal Code. The undisputed fact was that the appellant whilst driving a car No. W. 1496 along the main road near Nibong Tebal knocked into a small boy aged eight as a result of which the boy died. The prosecution called the wife of the accused who said that the boy was running across the road. Two other prosecution witnesses said that the boy was walking along his left side of the road either on or very close to the grass verge. The learned President of the Sessions Court said in his grounds of judgment, *inter alia:* "Of these two stories I was more inclined to believe at the close of the prosecution case the story of P.Ws. 6 and 7 than that of P.W. 8; but I found that in either case I was satisfied on the prosecution evidence that the accused was driving rashly and that his brakes were inefficient; and so I called upon the defence". The accused gave evidence which confirmed that of his wife P.W. 8. The learned President thereupon found the appellant guilty under s. 304A of the Penal Code.

Held: (1) in view of the provisions of s. 182(f) of the Criminal Procedure Code (Cap. 21) the Court is bound at the conclusion of the case for the prosecution to decide definitely which, if either, of two possible but incompatible versions of the facts has been proved; (2) as the learned President had failed to do this in this case, the appeal must be allowed.

Semble: In a summary trial the prosecution need not call every witness from whom a statement has been taken. The prosecution has a discretion in this matter but the discretion must be exercised fairly.

Cases referred to:—

(1) *Public Prosecutor v. Lee Pak* (1938) F.M.S.L.R. 1; (1937) M.L.J. 265.

(2) *Teh Lee Tong v. R.* (1956) M.L.J. 194.

(3) *Adel Muhammed El Dabbah v. Attorney-General for Palestine* (1944) A.C. 156; (1944) 2 All E.R. 139.

MAGISTRATE'S CRIMINAL APPEAL.

Lim Cheng Ean for the appellant.

F. G. Cooke (Federal Counsel) for the respondent.

Spenser Wilkinson J.: — The appellant was charged in the Sessions Court as follows:—

"(1) That you on 29.5.55 at about 3.35 p.m. at 22 mile-stone Main Road, Nibong Tebal, P.W. South being the driver of a motor car No. W. 1496, did cause the death of one Thannabalan s/o Balakrishnan by doing a rash act not amounting to culpable homicide, to wit by knocking down the said Thannabalan s/o Balakrishnan and that you have thereby committed an offence punishable under s. 304A of the Penal Code.

(2) That you on the same date, time and place being the driver of a motor car No. W. 1496 did fail to maintain the brakes in good and efficient working order and that you have thereby committed an offence under s. 98 of the Motor Vehicles (Construction and Use) Regulations, G.N. 944/48 and punishable under s. 8 of the Road Transport Proclamation No. 17/45".

I am not at all sure that these charges ought to have been tried together but as this point was not raised and the appeal dealt only with the first charge I need not consider this point.

The undisputed fact was that the appellant whilst driving Car No. W. 1496 along the main road near Nibong Tebal knocked into a small boy aged eight as a result of which the boy died.

Paragraph 3 of the grounds of judgment of the learned President reads as follows:—

"The only eye witnesses to the accident were P.Ws. 6, 7 and 8 and the accused. P.Ws. 6 and 7 said that the boy was walking along on his left side of the road either on or very close to the grass verge; and that the car, coming up behind him, swerved into him when meeting an on-coming lorry; and that the boy did not run across the road. P.W. 8, the wife of the accused and a passenger in his car said that the boy was running across the road from the car's right to its left with his head down; that there was no other vehicle on the road at the time; that visibility was good; and that the road was straight and clear. Of these two stories I was more inclined to believe at the close of the prosecution case the story of P.Ws.

6 and 7 than that of P.W. 8; but I found that in either case I was satisfied on the prosecution evidence that the accused was driving rashly and that his brakes were inefficient; and so I called upon the defence".

He goes on in paragraph 4 as follows :—

"The accused, in his defence, confirmed the evidence of his wife P.W. 8. I found that it would not be unreasonable for me to hold that the boy did run across the road. On this basis I reconsidered the prosecution case. . . . . "

I need not go in detail into the findings of fact thereupon made by the learned President and it is sufficient to say that he found that it was rash of the accused to drive the car at the speed, or with such inefficient brakes, or in the straight direction he took immediately before hitting this boy and that this rashness existed notwithstanding the negligence of the boy. He therefore found the accused guilty under section 304A of the Penal Code.

It is not clear to me why the prosecution called the accused's wife as a prosecution witness at all. It was held as long ago as 1937 (see *Public Prosecutor v. Lee Pak*[1]), that in a summary trial the prosecution need not call every witness from whom a statement has been taken and this case was followed in *Teh Lee Tong v. Rex*[2]. The following passage from the judgment in the latter case sets out the position in regard to summary trials :—

"I think the result of the above remarks combined with the two decisions referred to may be summarised in this way:—

(1) All the witnesses from whom statements have been taken should be brought to the Court by the prosecution, except those whose evidence will clearly and obviously throw no light on the case; any witness not so brought to Court must be made available to the accused, should he desire to call him.

(2) Having brought the witnesses to Court the prosecuting officer is not bound to call or to offer for cross-examination a witness whose evidence is in his opinion unnecessary or is obviously hostile.

(3) The existence of witnesses brought to Court but not called or offered for cross-examination under (2) above must be brought to the attention of the Court so that they are available to be called by the defence, or by the Court should the Court consider this necessary".

I would only add to what was said in that case that the discretion thus exercised by the prosecution must be exercised fairly and will not excuse the prosecution from calling a witness who clearly ought to have been called and that the situation will in practice often be met by offering a probably hostile witness for cross-examination (see *Adel Muhammed El Dabbah v. Attorney-General for Palestine*[3]).

There may be cases in which the prosecution are unable to decide which of two versions of the facts given in the witnesses' statements is the true one and feel it their duty to place all the facts before the Court for decision. Such cases, however, are rare and when they arise I think the prosecuting officer should open the case shortly making it clear that there are two possible versions of the facts. Normally, however, the prosecution, having accused a person of an offence, should adduce evidence to prove that offence and should leave witnesses who are wholly defence witnesses to be called by the defence. In the present proceedings it seems to me that the substance of the case presented by the prosecution was that the boy was knocked down whilst walking on the grass verge or very close to it. Had such a case been proved it would have afforded strong evidence of rashness on the part of the accused. The accused's wife may have been called by the prosecution under a mistaken belief (which notwithstanding the above cited and other decisions still appears to exist) that the Police ought to call all the witnesses from whom they have taken statements; or she may have been called simply to prove that the accused was driving the vehicle at the material time. If she was called for the latter purpose then she could have been asked the appropriate question to elicit this fact and then left to be cross-examined in regard to the rest of her story, which would then not have formed part of the prosecution case.

Be this as it may it is clear from the passages quoted from the learned President's grounds of decision that at the close of the prosecution case he was inclined to believe the prosecution case as deposed to by the 6th and 7th witnesses. How strong this inclination was it is difficult to tell, but unless the learned President was satisfied beyond a reasonable doubt that these facts had been proved he should not have called upon the accused for his defence. In my opinion in view of the provisions of section 182(f) of the Criminal Procedure Code the Court is bound at the conclusion of the case for the prosecution to decide definitely which, if either, of two possible but incompatible versions of the facts has been proved.

If the learned President in stating that he was inclined to believe the story of the 6th and 7th witnesses meant that the prosecution had made out their case on that evidence then it is clear from the rest of his grounds of decision that the defence subsequently raised more than a reasonable doubt as to this version and the accused should, therefore, have been acquitted. If, on the other hand, he meant that he could not decide at the close of the prosecution case which version was the true one then the prosecution had not made out their case and the accused should not have been called upon for his defence.

The learned Deputy Public Prosecutor agreed that the learned President ought to have made up his mind regarding the facts before calling upon the defence and it therefore became unnecessary to consider any of the other grounds of appeal.

For the above reasons the appeal was allowed and the conviction quashed.

Appeal allowed

LIM TENG HONG v. PUBLIC PROSECUTOR

[A. Cr. J. (Thomson J.) April 26, 1956]

[Ipoh — Criminal Appeal No. 24 of 1956]

Road Traffic — Road Transport Proclamation — Motor Vehicles Third Party Risks Regulations, reg. 3(1) and (2) — Disqualification — Period of disqualification.

The appellant in this case was convicted of driving a motor car without there being in force a Third Party Insurance Policy in contravention of regulation 3(1) of the Motor Vehicles Third Party Risks Regulations. He was fined $250 and disqualified from holding a driving licence for a period of two years. He appealed against the disqualification.

Held: (1) by regulation 3(2) of the Motor Vehicles Third Party Risks Regulations, disqualification for 12 months follows automatically on a conviction and there is no power in the Court to make any order of any sort; (2) therefore the order of disqualification in this case must be set aside.

MAGISTRATE'S CRIMINAL APPEAL.

M. S. Mahendran for the appellant.

A. P. Jack (Federal Counsel) for the respondent.

Thomson J. : —The appellant in this case was convicted in the Magistrate's Court at Ipoh of driving a motor vehicle without there being in force a Third Party Insurance Policy in contravention of Regulation 3(1) of the Motor Vehicles Third Party Risks Regulations made by the Commissioner for Road Transport under the Road Transport Proclamation. He was fined $250 and disqualified from holding a driving licence for a period of two years.

He appealed against so much of his sentence as consisted in disqualification from holding a driving licence for two years. I allowed the appeal and set aside the order of disqualification.

Regulation 3(1) of the Regulations in question provides that it shall not be lawful for any person to use a motor vehicle unless there is a Third Party Insurance Policy in force in respect of such user and sub-regulation (2) provides that any person acting in contravention of the Regulation shall be liable to fine or imprisonment and

"Shall (unless the Court for special reasons. thinks fit to order otherwise and without prejudice to the power of the Court to order a longer period of disqualification) be disqualified for holding or obtaining a driving licence for a period of twelve months from the date of the conviction".

I do not pretend to speak with any confidence as to the confused mass of B.M.A. Proclamations, Emergency Regulations and Regulations made under B.M.A. Proclamations which constitute the Road Traffic law of this unfortunate country. But Regulation 3(2) says that the disqualification which it attaches to a conviction is to be "without prejudice to the power of the Court to order a longer period of disqualification" and I have been unable to discover, nor has the Deputy Public Prosecutor been able to shew me, anything that gives the Court any power to disqualify on conviction for such an offence under the Regulation. It seems to me, and again I speak without certainty, that no such power exists. Under the Regulation disqualification for twelve months follows automatically on a conviction and I am satisfied that in the absence of anything outside the four corners of the Regulation there is no power in the Court to make any order of any sort. It was for that reason that I set aside the order disqualifying the present appellant for two years.

I think I should point out that Regulation 3(2) is the same as section 35(2) of the English Road Traffic Act, 1930. Under that Act, however, the words "without prejudice to the power of the Court to order a longer period of disqualification" clearly refer to the power given to the Court by section 6 of the Act which provides that any Court before which a person is convicted of any criminal offence in connection with the driving of a motor vehicle the Court shall order him to be disqualified for holding a licence for such period as the Court thinks fit. I can, however, find nothing corresponding to section 6 of the English Act in our legislation.

Appeal allowed.

PUBLIC PROSECUTOR v. ABDUL MANAP

[O. Cr. J. (Briggs J.) December 11, 1952]

[K. L. — Criminal Trial No. 64 of 1952]

Penal Code, ss. 96 & 99 — Private defence — Retaliation in excess of private defence.

The accused in this case was charged with voluntarily causing grievous hurt by stabbing the complainant. The fact that he stabbed the complainant was never denied and the only contested issue was how far his offence might be annulled or diminished either because there was a proper exercise of the right of private defence or because there was provocation. The facts were that the parties had a dispute about some rent payable by the complainant for a padi field. Both parties had lost their tempers, and the accused, a much smaller man, struck the complainant. It was not suggested that the blow was a serious one. The complainant in retaliation throttled and severely assaulted the accused and the latter had no opportunity to escape. He stabbed the complainant.

Held: (1) notwithstanding that the accused struck the first blow and therefore the complainant was entitled to exercise his right of private defence, the complainant's retaliation was of such a violent nature that it exceeded private defence; (2) the accused in his turn was entitled to exercise his right of private defence, and, on the facts, his exercise thereof was not excessive.

CRIMINAL TRIAL.

B. Sheldon (Federal Counsel) for the Public Prosecutor.

Accused in person.